SUPREME COURT, U. S.

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NO. 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER ON REARGUMENT

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BRIEF FOR PETITIONER ON REARGUMENT

STATEMENT

This case, then numbered 181, O. T. 1966, was argued on January 18, 1967. On June 12, 1967, the Court ordered the case restored to the docket for reargument at the 1967 Term, 387 U.S. . . . ., and requested counsel to discuss, in their briefs and oral arguments, the following questions:

(1) What relevance, if any, has the required records doctrine, Shapiro v. United States, 335 U.S. 1, to the validity under the Fifth Amendment of the

obligation to pay the wagering excise tax imposed by 26 U.S.C. § 4401?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U.S.C. § 4401 conditioned upon the filing of a return required under 26 U.S.C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?

The present brief is limited to the two questions thus specified in the Court's order. We refer the Court to our brief filed last term for discussion of the other aspects of the case.

SUMMARY OF ARGUMENT

I. The "required records" doctrine would be relevant in this case only if it means that the privilege against self-incrimination is inapplicable whenever the law requires a writing to be kept or made. Such a rule would destroy the privilege. This Court, lower courts, and commentators have all recognized that the doctrine cannot be that sweeping, although the limitations on the doctrine are not yet clearly formulated. Any of the possible limits on the "required records" doctrine would put this case beyond that doctrine.

The limitation most clearly supported by authority and reason is between records, required to be maintained and subject to inspection, and reports, which must be filed with the government. To make a person come forward on his own initiative and file incriminating reports is indistinguishable from compelling him to make oral disclosures on the witness stand. There is a less drastic inroad on the policies of the privilege if he is merely required to permit the government, on its initiative, to inspect pre-existing records he has kept.

It is possible also to draw a distinction in terms of whether the records required relate to acts and activities that are normally lawful or normally criminal. Such a distinction between "an essentially noncriminal and regulatory area of inquiry" and "an inquiry in an area permeated with criminal statutes" is stated in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 79 (1965), and may explain why the Court there held invalid a registration requirement without making any reference to the "required records" doctrine. Alterna-

tively it may be held that the doctrine applies only if the dominant purpose of the record requirement is something other than the detection and prosecution of crime.

In the present case the person subject to the law is required to come forward and file reports of his activity in an area permeated with criminal statutes by a statute principally intended to aid the detection and prosecution of crime. By any test the "required records" doctrine cannot defeat the constitutional privilege here.

II. The statutes and Treasury Regulations, 26 U.S.C. §§ 6001, 6011(a), Treas. Reg. § 44.6011(a)-1, explicitly require every person liable for the excise tax on wagers to make a return on Form 730. Even if an administrative practice of accepting payment without filing of the form would be permissible in the face of those statutes and regulations, there is no indication that any such practice exists. The testimony of the government witnesses in this case clearly presupposed that the excise tax can be paid only by filing a Form 730, and the only evidence that petitioner did not pay the tax is that he did not file such a form. It thus appears that satisfaction of the obligation to pay the wagering excise tax is conditioned upon the filing of the return required by the statute and regulations.

ARGUMENT

I. The "Required Records" Doctrine Is Not Relevant to the Obligation to Pay the Wagering Excise Tax

When this case came to the Court last term, it was set down for argument with *Costello v. United States*, No. 41, O. T. 1966.[1] In its brief in the *Costello* case, at page 25 n. 24, the United States said:

> We have not discussed, and there is no need for the Court presently to consider, any possible relationship between the privilege against self-incrimination and the so-called "required records" doctrine, see *Shapiro v. United States*, 335 U.S. 1. No such issue is involved on the facts of this case.

Since there is no apparent distinction between the excise tax, involved in this case, and the occupational tax, involved in *Costello*, insofar as the "required records" doctrine is concerned, petitioner regarded this concession by the United States as applicable to both cases, and neither petitioner nor the United States made any reference to the "required records" doctrine in their briefs in the present case at the 1966 Term. We were fortified in doing this by the fact that the statement of the United States in the *Costello* brief appeared to us clearly right. In response to the first question posed by the Court in its order of June 12th, we spell out the reasons for this conclusion.

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1. Costello died in December, 1966. On January 9, 1967, the Court granted certiorari in *Marchetti v. United States*, No. 38, O. T. 1966, renumbered No. 2, O. T. 1967, and set it for argument in place of the *Costello* case. The government's brief in *Costello* served as its brief in *Marchetti*.

Argument.

The leading case of *Shapiro v. United States,* 335 U. S. 1 (1948), involved conviction of a dealer for having made tie-in sales in violation of regulations under the Emergency Price Control Act. The conviction was challenged on the ground that § 202(g) of that Act, incorporating by reference the immunity provisions of the Compulsory Testimony Act of February 11, 1893, gave defendant immunity since he had produced records about the transactions in question in response to a subpoena issued by the Price Administrator under the authority of the Act. A bare majority of this Court rejected that contention. The Court first held that the immunity provisions applied only if a person had been compelled to produce information as to which the privilege against self-incrimination would otherwise be available It then adopted a dictum from *Wilson v. United States,* 221 U.S. 361, 380 (1911), that some records required by law to be kept can no longer be regarded as merely private papers, and that the privilege of the Fifth Amendment does not apply to them. The records produced by Shapiro were within a regulation adopted under the Emergency Price Control Act requiring a dealer to keep "records of the same kind as he has customarily kept" relating to the prices he charged. Maximum Price Regulation 426, § 14, 8 Fed. Reg. 9546 (1943). The Court then concluded that such records fitted the "required records" concept of the *Wilson* case.

> In the case at bar, it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." Nor can there be any doubt that when it was obtained by the Administrator through the use of a subpoena, as authorized specifically by

> § 202(b) of the statute, it was "legally obtained" and hence "available as evidence." The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Admintrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute.

335 U.S. at 34-35.

For the *Shapiro* doctrine to have relevance here, the following line of reasoning would be necessary. Statutes and regulations require the payment of an excise tax on wagers and the filing of a return showing the amount of wagers received. 26 U.S.C. §§ 4401, 6011; Treas. Reg. § 44.6011(a)-1(a). Such a return, if made, would have "public aspects" and would be a "required record." Therefore the privilege against self-incrimination does not apply to such a return, and a person liable for the tax cannot refrain from filing the return and paying the tax on the ground that to do so would make him a witness against himself in a criminal proceeding.

We accept for present purposes the *Shapiro* result, although the dissents in that case show how much was to be said for a contrary view, even on those facts. Neither authority nor reason, however, support the sweeping extension of *Shapiro* that would be required to make it relevant here.

If the privilege against self-incrimination has no application to an excise tax return, because such a return is required by law, then the same conclusion would be in order for an income tax return. To reach that con-

clusion would require rejecting the considered dictum of *United States v. Sullivan,* 274 U.S. 259, 263 (1927), that an income taxpayer may claim the privilege on his return if the form of return provided calls for answers that he is privileged from making. Similarly, if the "required records" doctrine is applicable here, then the wrong result was reached in the recent and unanimous decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), for there would be at least as much force in regarding the registration of Communists involved in that case as a "required record" as there would be in so regarding an excise tax return.

The case closest on its facts to the present case is *United States v. Ansani,* 138 F. Supp. 451 (N.D. Ill. 1956). There the court held unconstitutional so much of 15 U.S.C. § 1173, as it then stood, as required manufacturers of or dealers in gambling devices to file monthly records of all sales and deliveries of gambling devices. The court said, at 453-454:

> The required reports here are personal reports in every sense of the term—they are not public records, outside the protection of the Constitution, as was the case in Shapiro v. United States * * *. A dealer in gambling devices, a natural person entitled to the personal guarantees in our Bill of Rights, is compelled by a penal statute to report his unlawful acts. To say that these required reports become public documents is to erase the Fifth Amendment from the Constitution.

It is interesting, in light of the distinction we suggest below, that Congress subsequently amended the statute in question. The amended statute requires records to

be kept, and makes them subject to inspection, but eliminates the requirement that the person involved file them with the Attorney General. Act of Oct. 18, 1962, Pub.L. 87-840, § 5, 76 Stat. 1075.

The court was right in *Ansani* in saying that a contrary result would erase the Fifth Amendment from the Constitution. For the *Shapiro* principle to apply in this case, or in *Ansani,* it would be necessary to read *Shapiro* as holding that the privilege against self-incrimination is inapplicable to any writing required by law to be kept or made. There might still be some vague and undefined due process limitation on the power of government to require a particular kind of record, but the privilege against self-incrimination itself would no longer have any effect. "The notion that because a disclosure is required the privilege does not apply, if extended to its full logical reach, is capable of entirely destroying the privilege." Mansfield, *The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 148-149.

Though lower courts and commentators have had difficulty in determining the precise proposition for which *Shapiro* stands, they have recognized that the doctrine announced there is limited, and is not to be carried to its full logical reach. In *Shapiro* itself this Court assumed that "there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." 335 U.S. at 332. Only last Term, in *Spevack*

v. Klein, 385 U.S. 511, 518-519 (1967), the plurality opinion stated that the lawyer involved had been denied an opportunity to make a record that the documents demanded by subpoena there — some, at least, of which were clearly required to be kept by local rule — "had no 'public aspects' within the required records rule but were private papers." See also 385 U.S. at 520 (Fortas, J., concurring). The clear implication is that not every record required by law to be kept has "public aspects" so as to bring it within the *Shapiro* rule.

Two commentators who think well of the "required records" doctrine recognize that there are limits on it. Dean McCormick says:

> Doubtless the records and reports requirement must be directed toward some class of acts and activities that would normally be lawful rather than criminal. A requirement that every person who kills another with firearms should report the fact to the sheriff would presumably fall afoul of the privilege.

McCormick, Evidence 283 (1954). Professor Meltzer puts a somewhat different example:

> Suppose, e.g., the federal government in order to enforce the Mann Act required the keeping of records of all interstate excursions involving women. Would that requirement be valid? One can fit the statute under the standard announced by the Chief Justice in the Shapiro case, but it obviously has a different flavor from statutes requiring records as an incident of a comprehensive regulatory program. It is not easy, however, to say precisely what the difference is. Perhaps it is that the sole or the

> dominating purpose of the hypothetical record requirement appears to be to compel criminals to keep incriminating records to be used to convict the record-keepers in subsequent criminal trials. Where this appears to be the dominant purpose, a compelling argument may be made that the statutory requirement would appear to be invalid under the Fifth Amendment or, at least, ineffective to destroy the privilege.

Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimination,* 18 U.Chi.L.Rev. 687, 714-715 (1951). See also *United States v. Ansani,* 138 F.Supp. 451, 454 (N.D. Ill. 1956), where it is said that a statute requiring all burglars to file monthly reports of burglaries perpetrated and an inventory of all stolen goods would be repugnant to the Fifth Amendment.[2]

The problem is not whether there are limits to the *Shapiro* rule — on that all are agreed — but what those limits are. Courts and commentators have suggested a variety of possible limits. We submit that whatever limit is appropriate, this case is beyond it. We shall discuss the various possibilities, but consider first the distinction between this case and *Shapiro* that to us seems best supported by reason and authority and most clearly decisive of this issue in the present case.

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2. The analogy to a tax on proceeds of burglaries was much discussed at the first argument of this case. See *Kansas City v. Lee,* 414 S.W.2d 251 (Mo. 1967), where the court, upholding an ordinance making it a crime to possess a wagering tax stamp with the intent to engage in gambling, found the ordinance indistinguishable from statutes making it unlawful to possess burglary tools.

Argument.

The distinction we here urge is between reports and registration statements, which must be filed with the government, and records, which must be maintained and may be subject to inspection by the government. There are provisions in the statutes and regulations dealing with the wagering excise tax requiring the keeping of records. 26 U.S.C. §§ 4403, 4423, 6001(a); Treas. Reg. §§ 44.4403-1, 44.6001-1. In the present case there is no issue before this Court as to records of that type. Petitioner is not charged with failure to keep such records nor with refusal to permit inspection of them. There is division of opinion whether even that kind of record is within the "required records" doctrine. Compare *United States v. Remolif*, 227 F.Supp. 420, 423 (D. Nev. 1964) (doctrine not applicable), with *United States v. Willis*, 145 F.Supp. 365, 368-369 (M.D. Ga. 1955) (doctrine applicable). The only appellate decision in point we have found is *United States v. Clancy*, 276 F.2d 617, 629-631 (7th Cir. 1960), where the Seventh Circuit held that the "required records" doctrine applied to records of wagers required to be kept by 26 U.S.C. §§ 4403, 4423, and 6001. The force of that decision is lessened by the fact that it was reversed here, albeit on another ground, *Clancy v. United States*, 365 U.S. 312 (1961), and even more by the fact that when the case reached this Court the Solicitor General expressly disclaimed reliance upon the ruling of the court of appeals that the records involved were not private papers within the Fourth and Fifth Amendments. Brief for the United States, *Clancy v. United States*, No. 88, O. T. 1960, p. 37 n. 14.

Whatever may be the ruling with regard to the records required by § 4403 and the other provisions of

the Code and regulations, the situation is far different with regard to the return that must be filed for payment of the tax under § 4401. As Justice Douglas observed in his dissent in *Communist Party of the United States v. Subversive Activities Control Board,* 367 U.S. 1, 179-181 (1961): "The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony, not the surrender of preexisting records. * * * The cases dealing with the duty to keep records (see Shapiro v. United States, supra) can be put to one side." This, of course, was the result reached by the whole Court when the issue in the *Communist Party* case was decided on the merits in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), and it is worthy of note that in *Albertson* the Court did not feel compelled even to make reference to *Shapiro.*

The distinction suggested is that applied by the Ninth Circuit in *Russell v. United States,* 306 F.2d 402, 410-411 (9th Cir. 1962), involving the registration provision of the National Firearms Act, 26 U.S.C. § 5841:

> *Shapiro v. United States,* 335 U.S. 1, 68 S.Ct. 1375, also relied upon by the Government, involved neither a taxing statute nor a registration provision * * * There is little if any similarity between the provisions of the Emergency Price Control Act, and regulations thereunder, requiring the maintenance and production of certain records, and the section 5841 registration provision. Section 5841 does not pertain to the regular maintenance of records. Rather it requires the furnishing of information concerning past conduct when, and only when, such

past conduct is actually or presumptively unlawful. In the light of subsequent pronouncements by the Supreme Court, we are not disposed to read the opinion in Shapiro any broader than its actual holding, namely that one may be compelled to produce for examination business records required to be kept in due course.

The distinction here suggested is fully consistent with the result in *Shapiro*, since that case involved production under subpoena of records regularly kept. It also seems to be consistent with the observation by the Court in *Shapiro* that "of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity in return for privilege." 335 U.S. at 27 (emphasis by the Court). See also *Curcio v. United States*, 354 U.S. 118 (1957), where the privilege was held applicable to oral testimony under circumstances such that records would not have been privileged. In *Albertson* it was said that " if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U.S. at 78. *Albertson* has been read as making it clear that the government may not use registration as a device to compel disclosures that would support a claim of privilege on the witness stand. *The Supreme Court, 1965 Term*, 80 Harv.L.Rev. 91, 210 (1966). See also Mansfield, *The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 135. The registration statement and the tax return, with their questions calling for incriminating answers, seem more akin to testimony on the witness stand than they do to the keeping of routine business records. In our initial brief

we argued that petitioner could not have been required to give oral testimony about the gross amount of wagers accepted by him in a preceding month, and that the privilege should protect him as fully when the government seeks that information on a tax return. (Pet.Br. 8-10). This argument is relevant also in connection with "required records" aspects of the case.

Among the complex of values protected by the privilege against self-incrimination are our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt, our preference for an accusatorial rather than an inquisitorial system of justice, and our sense of fair play, which dictates a fair balance between the state and the individual by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 55 (1964). See also Comment, *Self-Incrimination and Registration Statutes: A Case Against Constitutionality,* 4 Houston L. Rev. 507 (1966). The limitation on *Shapiro* here urged, that the privilege applies to reports even if not to records, is a minimal safeguard if these values are to be preserved. A record-keeping rule still leaves the burden on the government to take the initiative and to search out the records in the citizen's hands with which it may later make a case against him. This is a less drastic inroad on the policies of the privilege than would be involved if the citizen were required, on pain of criminal penalties, to come forward on his own and give to the government reports showing that he has violated the laws.

Though we think that the distinction between reports and records is entirely consistent with the cases, supported by sound policy, and fully decisive of the present case, there are other possible limitations on the "required records" doctrine that have impressive support and that would be equally decisive. One such limitation is suggested by the distinction drawn in *Albertson* between "an essentially noncriminal and regulatory area of inquiry" and "an inquiry in an area permeated with criminal statutes." 382 U.S. at 79. *Shapiro* is a classic example of the former area. *Shapiro* was a licensee under as complete a regulatory scheme as the nation has known, a scheme justified under the war power and the demands of national emergency. In most instances the production of the records required under the Emergency Price Control Act, though useful to the government for the operation of its regulatory plan, would not incriminate the owner of the records. But to file a document, or produce records, showing one to be a Communist, or a gambler, or a possessor of illegal firearms, or a dealer in gambling devices is a sure invitation to a criminal prosecution, and in most cases would suffice for a conviction. This line of distinction was in Dean McCormick's mind when he made the observation quoted earlier that the "required records" doctrine can only apply to "acts and activities that would normally be lawful rather than criminal." McCormick, Evidence 283 (1954). See also the observation of the Ninth Circuit that the firearms registration provision is unconstitutional because it requires information about past conduct "when, and only when, such past conduct is actually or presumptively unlawful." *Russell v. United States,* 306 F.2d 402, 411 (9th Cir. 1962).

This argument has been put in somewhat different form in a thoughtful recent commentary. Note, *Required Information and the Privilege against Self-Incrimination,* 65 Col.L.Rev. 681 (1965). The conclusion reached there is that disclosure may be required of "information that reflects essentially neutral activity," *id.* at 695, and that "the determining factor is whether the information sought is of such a nature that it would come into independent existence in the absence of government compulsion." *Id.* at 694. Shapiro would have kept records of his business whether the government required such records or not. Indeed the relevant regulation called for "records of the same kind as he has customarily kept." That one is a Communist, or that one has accepted wagers, is the kind of information ordinarily kept as clandestine as possible. On the test proposed by the commentator, as on the more straightforward distinction between those areas essentially noncriminal and those permeated with criminal statutes, the "required records" doctrine would not apply and the privilege would be available in the present case.

Not unrelated to the test just considered is the suggestion that the purpose of the record requirement is the measure of its validity. We have quoted earlier from Professor Meltzer's article where it is suggested that if the dominant purpose of requiring the record is to make it easier to convict criminals, the privilege against self-incrimination applies, but that if the dominant purpose is something other than the detection and prosecution of crime, the records may be used where they do provide evidence of crime. Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimina-*

tion, 18 U.Chi.L.Rev. 687, 715 (1951). This seems a more doubtful limitation than those that have previously been discussed, for it opens the door for psychoanalyzing Congress or an agency as to the dominant purpose of a particular requirement. In any event, it would not alter the result in the present case. Even if the wagering taxes produce enough revenue to pass muster as a bona fide exercise of the tax power, it can hardly be said that this is their dominant purpose. The express statutory provision making records as to the occupational tax available to state prosecutors, 26 U.S.C. § 6107, the absence of any provision for confidentiality of excise tax returns, and the practice of the Internal Revenue Service in furnishing excise tax returns to aid in criminal prosecutions (Pet.Br. 20-23) all confirm the indications in the legislative history of the law that the dominant congressional motive was "to hinder, if not prevent the type of gambling taxed." *United States v. Kahriger,* 345 U.S. 22, 27 n. 3 (1953). See also the concurring opinion of Justice Jackson in the *Kahriger* case: "This is difficult to regard as a rational or good-faith revenue measure, despite the deference that is due Congress." *Id.* at 35.

Although each of the limits discussed thus far would be enough to make the "required records" doctrine inapplicable in the present case, and there are good reasons for each of them, it is fair to say that neither singly nor together do they provide the full measure of protection that the Fifth Amendment would seem to require. There are stronger arguments for finding the privilege applicable where reports must be filed than where records must be kept—but the fact remains

that Shapiro was coerced to provide evidence that led to his own conviction, a result not easily reconciled with the privilege. To limit the "required records" doctrine to essentially noncriminal areas would prevent the most odious use of the doctrine—but it would be of scant comfort to the person engaged in such an area whose records do reveal that he has committed a crime. Nor would it be much more palatable to convict a person on the basis of a record he has been required to keep because the dominant purpose of requiring the record was some laudable goal other than unearthing criminals. "The Fifth Amendment has no meaning if it does not protect against incriminating questions asked in the pursuit of legitimate public interests." Blake, *Self-Incrimination, Registration Statutes, and George Washington's Cherry Tree,* 23 L. in Trans. 197, 217 (1963).

Two recent commentators have suggested the only solution to this matter that will fully respect the privilege against self-incrimination while giving recognition to the government's need for information. This is to grant immunity if disclosure of information is compelled, at least to the extent of barring use of the information, or the fruits thereof, in a criminal prosecution. Mansfield, *The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information,* 1966 Sup.Ct.Rev. 103, 159-166; Comment, *Self-Incrimination and the Federal Excise Tax on Wagering,* 76 Yale L.J. 839, 845 (1967). This rule would not lead to a different result than those discussed earlier. No such immunity has been granted by statute, and, for reasons we have presented before

(Pet.Br. 25-27), we think it is for Congress rather than this Court to create the immunity.[3]

> In the wagering tax, however, Congress has made a specific decision *not* to provide such immunity. Unless the Court is willing overtly to amend the statute, it must construe the provision of immunity on its face, as did the Albertson court. With such an approach, the tax as written must fall under a self-incrimination claim.

Comment, 76 Yale L.J. 839, 844 (1967) (emphasis in original).

We do not urge on the Court the solution proposed by the commentators just cited. Though it would lead to the same result in this case as the other tests discussed, there is one important difference. The other tests all are limitations on the "required records" doctrine, fully consistent with the result in *Shapiro*. The solution just discussed would have required a different result in *Shapiro*. Since the "required records" doctrine should be held inapplicable in the present case on the narrower grounds presented, decision whether to overrule *Shapiro* can be left to another day when that issue is squarely raised.

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3. Congress is not slow in providing such immunity if it is needed. See S. 677, 90th Cong., 1st Sess., passed by the Senate on June 13, 1967, providing for immunity if the public interest requires it in the enforcement of the Anti-Racketeering Act, 18 U.S.C. § 1952, and three other statutes.

II. The Obligation to Pay the Wagering Excise Tax Is Conditioned Upon the Filing of Form 730

Petitioner awaits with some interest learning the position of the United States on the second of the questions posed by the Court in the order restoring this case for reargument.

In our original submission we stated briefly the reasons why, in our view, the wagering excise tax can only be paid in connection with filing the required form, Form 730, and further suggested that even on the unrealistic supposition that the Internal Revenue Service would accept payment of the excise tax without requiring a Form 730, it would be necessary for the taxpayer to identify the tender as being the sum due under 26 U.S.C. § 4401. (Pet. Br. 15-17). In its brief the United States limited itself to the following comment:

> We assume, *arguendo,* that the filing of the appropriate return (Form 730, App. B, *infra*) must accompany payment of the excise tax, or that at least some identification of the taxpayer must be provided along with such payment, since a tax measure cannot be effectively administered without obtaining a minimal amount of information from the persons being taxed.

(Govt. Br. 19 n. 14). We understood this to mean that the parties were in agreement on this subsidiary issue. Thus petitioner was surprised when counsel for the United States told the Court at oral argument that a taxpayer could tender a check marked "Miscellaneous Excise Taxes," and that this would be accepted by the Service and constitute a sufficient compliance with § 4401.

Argument.

We submit that the United States was right in the position it took in its brief, and in error in the view it advanced at oral argument.

The statutory scheme is explicit and unambiguous. "Every person liable for any tax imposed by this title, or for the collection thereof, shall * * * make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. * * *" 26 U.S.C. § 6001. The regulations authorized by that section have been made with regard to this particular tax. Treasury Regulation § 44.6011(a)-1 provides, in relevant part: "Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. * * *." Finally § 6011(a) of the Code states: "When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations." Thus § 6001 says that persons liable for the excise tax on wagers "shall" make such returns as the Secretary prescribes, the regulation prescribes that they "shall" make a return on Form 730, and § 6011(a) provides that they "shall" file Form 730 and include the information required by that form. The conclusion seems inescapable that "nothing in the Act or regulations permits less than literal and full compliance with the requirements

of the form * * *." *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 78 (1965).

The United States is in a better position than is petitioner to advise the Court of any administrative practice permitting payment of the tax without filing the form. The propriety of such an administrative practice, contrary to the command of the statute and regulations, would be doubtful, and indeed would raise questions whether conviction here for "willful" failure to pay the tax, under 26 U.S.C. § 7203, is consistent with the doctrine of *United States v. Murdock,* 290 U.S. 389 (1933). The sources available to petitioner, however, give no indication that there is any such administrative practice. The reported cases demonstrate quite clearly that there is no such practice with regard to the closely related occupational tax on wagers imposed by 26 U.S.C. § 4411. In two cases the United States has stipulated that the Commissioner would not accept payment of the occupational tax unless the taxpayer first furnished the information required on Form 11-C, the form relevant to that tax. *United States v. Kahriger,* 210 F.2d 565, 570 n. 5 (3d Cir. 1954); *United States v. Mungiole,* 233 F.2d 204 (3d Cir. 1956). In two other cases it is stated as a fact that the Commissioner refused applications for a wagering tax stamp because the applicant failed to furnish the required information. *United States v. Whiting,* 311 F.2d 191, 193 (4th Cir. 1962); *Combs v. Snyder,* 101 F.Supp. 531 (D.D.C. 1951), affirmed 342 U.S. 939 (1952).

The testimony in the trial court of witnesses from the Internal Revenue Service gives no indication that they are aware of any administrative practice permit-

ting payment of the tax without filing of the form. The technical advisor to the District Director for the Pittsburgh district, W. Dean Struble, testified that a person operating a lottery in that area would "be required to file his 11-C and his 730 with [his] office" (R. 92). Again he said that "those that are principals are required to file the Form 730" (R. 93). He testified with regard to another taxpayer that there was "no record of the excise tax having been paid" and explained that he meant by that that his search had turned up "no Form 730" (Tr. 960).[4] To the question whether petitioner's brother had paid the excise tax during a particular period, Mr. Struble thought it a sufficient answer to say that "there is no record of a return having been filed * * *" (Tr. 1440). Another government witness, Frederick A. Ruprecht, group supervisor of the wagering and excise division of the Internal Revenue Service for that district, testified that to determine what tax had been paid by petitioner or his associates, he "went through 730's which were filed at that time in this office alphabetically * * *" (Tr. 1484).

Mr. Struble testified directly that if there is no 11-C on file that means that the taxpayer did not pay the special occupational tax for engaging in the business of wagering during that period (R. 98). Though the question was never put in so many words, it is apparent throughout the testimony of Messrs. Struble and Ruprecht that if no Form 730 is on file, it means that the taxpayer did not pay the excise tax on wagering.

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4. By stipulation of counsel in this Court, either party may refer in its brief and oral argument to any part of the original record not designated for printing.

Indeed if the excise tax may be paid other than in connection with Form 730, petitioner's motion for a verdict of acquittal at the close of the government's case (R. 36) should have been granted. The only evidence of nonpayment of the tax was testimony that there was no Form 730 on file under the name of petitioner (R. 98) and that in computing the alleged tax liability appropriate credit had been given to the principals and partners for any tax returns filed by any of their associates (Tr. 1124, 1484, 1525-1526). There is not a word of evidence in the government's case to show that the tax had not been paid by means other than filing a Form 730.[5]

We submit that the government's proof in this record confirms what the statutes and regulations indicate: the obligation to pay the excise tax imposed by § 4401 is conditioned upon the filing of Form 730.

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5. Petitioner testified in his own defense. Though he did not say so in terms, a jury could reasonably conclude from his testimony that he did not pay the excise tax, with or without a Form 730. Whether this could cure the defect in the government's proof would raise the question discussed in *Cephus v. United States*, 324 F.2d 893 (D.C. Cir. 1963), but we do not brief that question because it seems to us so clear, for reasons stated above, that the tax cannot be paid without filing Form 730, and thus that proof that no Form 730 had been filed was sufficient proof that the tax had not been paid.

CONCLUSION

For the reasons stated above, and those set forth in our original brief, the judgment below should be reversed, with instructions to dismiss the indictment as to counts 1 to 4 and 6 to 17 and to grant a new trial on counts 20 to 23.

Respectfully submitted,

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